Supreme Court of the United States.

OCTOBER TERM, 1984.

LOCAL 66, BOSTON TEACHERS UNION,
AFT, AFL-CIO,
Petitioner,

v.

BOSTON SCHOOL COMMITTEE, *et al.*,
Respondents.

CONCERNED BLACK EDUCATORS OF BOSTON,
Intervenor, Respondent.

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Is a judicial order in a school desegregation case equitable and constitutional where that order simply implements remedial orders which had been previously approved by the District Court, the Court of Appeals, and as to which this Court declined certiorari, and where that order, as well as the earlier remedial orders, were solely designed to rectify unconstitutional conditions which the District Court found to have existed in the school system?

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CONCERNED BLACK EDUCATORS OF BOSTON,
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In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Concerned Black Educators of Boston (CBEB), an organization of black teachers permitted to intervene as plaintiffs-intervenors in the above-entitled case, oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit brought by Local 66, Boston Teachers Union, requesting this Court to review the First Circuit's judgment in

Morgan et al. v. *O'Bryant, et al.*, (C.A. 1, Nos. 81-1561, 81-1617, 81-1619, and 81-1646; February 17, 1982).

Statement of the Case.

Between the years 1974 and 1982, the District Court for the District of Massachusetts entered certain orders designed to remedy violations of the constitutional rights of black parents and their children who attend the Boston Public Schools. In 1974, the District Court found that the Boston Public School authorities had knowingly engaged in a policy of racial discrimination, had intentionally maintained a dual system along racially segregated lines. As part of that finding, the District Court issued certain preliminary orders. *Morgan* v. *Hennigan*, 379 F.Supp. 410 (D. Mass. 1974). The first circuit affirmed both the underlying findings and the preliminary orders. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Additional remedial orders were entered in 1975 and affirmed in 1976 in *Morgan* v. *Kerrigan*, 401 F.Supp. 216 (D. Mass. 1975), affirmed, 530 F.2d 401 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

The District Court had specifically found that one aspect of the intentional segregation of the Boston Public Schools was the "racial composition and distribution of faculty members in the school system." 379 F.Supp. at 456-466; 388 F.Supp. 581-582. Accordingly, the Court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20% (the percentage of blacks in Boston at the time), and that there be affirmative recruitment until a figure of 25% black faculty was reached. *Morgan* v. *Kerrigan*, 388 F.Supp. 581 (D. Mass. 1975). The First Circuit affirmed this finding, 530 F.2d 431 (1st Cir. 1975) and this Court declined review, 426 U.S. 935 (1976).

These orders were based on the Court's careful analysis of the nature of the constitutional violations of the rights of the black children in this school system, and the lengthy history of the defendants' non-compliance. It was consistent with the findings and rulings of other courts within the federal system and treated as such by the First Circuit Court of Appeals and by this Court.

Indeed, the Court's approach might be characterized as conservative; the statistical record suggests that an even higher goal would have been justified. In 1975, the percentage of black students in the Boston Public Schools was approximately 35%. *Morgan* v. *Kerrigan*, 388 F.Supp. at 582. Preliminary 1980 census figures showed black population of over 22%. The projected percentage of black children in the Boston Public Schools for 1981 was over 46%. Appendix [A] 3n.2.

Moreover, while there had been some changes in the school defendants'* performance, the record as a whole remained a sad one. As recently as 1978, the District Court found that the defendants had intentionally evaded its two-year-old faculty recruitment and hiring orders. With the tacit approval of the petitioner herein, the BTU, the school defendants had hired several hundred more white teachers than black rather than obeying the court's remedial orders.** As a result, the District Court modified its original orders to require that the percentage of black teachers increase annually by at least one and one-half percentage points until the 20% goal was obtained. This

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*The School defendants are the Boston School Committee, as individual members and the Superintendent of the Boston Public Schools.

**The defendants accomplished this by discontinuing the appointment of new permanent teachers and making a disproportionate number of white provisional teachers permanent by re-hiring them, thereby giving them tenure. They then claimed as the BTU does now, that they were unable to effect the desegregation of the school faculty because of the legitimate expectations of tenured white teachers.

order, entered July 5, 1978, was unpublished, and, unlike the earlier orders, was not appealed.

By early 1981, the percentage of black teachers had risen only to 19.08%, and that of black administrators, 20.5%. Even this progress was threatened by a budget crisis as a result of which the school defendants proposed massive layoffs of teachers and administrators. The District Court was asked to implement its earlier orders in a situation in which the work force was contracting rather than expanding, in which there were massive layoffs, rather than hiring opportunities.

On the one hand, the CBEB argued that layoffs should be conducted in such a fashion as to achieve the goal of a 25% black faculty. The only reason that the Court ordered affirmative recruitment to bring the black faculty to 25% (from the 20% achieved through hiring quotas) was the Court's concern that the pool of black applicants would be inadequate to support a 25% goal. That concern was misplaced where layoffs were concerned as the higher goal could easily be achieved from the existing work force.

On the other hand, the petitioner, Boston Teachers Union, proposed — and continues to press for — the abandonment of the effort to desegregate the schools entirely. It has asked that the school defendants conduct layoffs according to strict seniority, even where such a process (given the projected number of layoffs) would eliminate all of the black teachers hired as a result of the lower court's order. If the seniority approach were followed, the percentage of black teachers would be reduced to 8%, in a school system now 46% black. It was a black faculty that was only 5.4% black that ignited the Court's attention in 1974.

The school defendants proposed an intermediate, maintenance approach — conducting layoffs in such a way as to fix the current percentage of black faculty and staff. It was this

approach that the District Court adopted, with some modifications.*

The Court's decision struck a careful balance between the opposing interests. It did so in a fashion wholly consistent with the principles outlined by this Court, and by the lower federal courts. The First Circuit Court of Appeals, once again, affirmed these orders characterizing them as:

> necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be contenanced. . .

Appendix [A] 13.

Summary of Argument.

The petition for certiorari of the Boston Teachers Union wholly mischaracterizes the Court's 1981 orders, suggesting that they effect a major change in this ten-year-old desegregation case, while at the same time minimizing the impact of the course BTU has urged upon the Court. It suggests that the Court's 1981 order does not meet the standards governing the award of equitable relief in a desegregation case; that it is an unconstitutional racial quota rather than a limited remedial order. To be sure, it is only by suggesting that the 1981 order is dramatically different from the Court's earlier orders that

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* The District Court order also specified that laid off black teachers would have an absolute preference in recall until the 20% goal is reached. The order suspended the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25% black faculty, until all tenured teachers who were laid off had been recalled.

the BTU hopes to escape the logical implications of its failure to appeal the Court's 1978 remedial orders; the implications of the actions of the First Circuit in affirming the orders that were appealed; and the implications of this Court's decision to decline certiorari concerning the earlier orders.

The District Court has done nothing but continue to enforce its earlier orders, which orders were affirmed by the First Circuit Court of Appeals and as to which this Court has consistently declined review. It has carefully followed the mandate of *Milliken* v. *Bradley*, 433 U.S. 267 (1977). The initial orders were designed to remedy specific constitutional violations found by the District Court. The 1981 order was designed to implement those remedial orders and to insure that the progress already made towards a desegregated school system would not be dismantled. Each of the orders was carefully constructed so as to restore the victims of discrimination — namely the school children of Boston — to the positions they would have occupied in the absence of discriminatory conduct. And, they are consistent with the federal court's concern that state and local authorities manage their own affairs consistent with the Constitution. In the instant case, the District Court affirmed the school defendants' maintenance approach.

The District Court has done nothing which is inconsistent with applicable decisions of this Court and of the lower federal courts. In short, none of the criteria for certiorari has been met.

Reasons for Opposing the Writ.

I. The Decision Below is Consistent with Settled Principles of Equity Declared by This Court to Govern the Fashioning of Race-Conscious Remedial Decrees.

The orders of the District Court in 1974, 1975, and 1978, formed part of a scheme to secure "make whole" relief for the

plaintiff class of black students and their parents. Such relief was required by this Court's mandate to eliminate the vestiges of segregation "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438 (1968). Furthermore, such relief was completely consistent with the standards for equitable remedies in school desegregation cases set forth by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977). In the only other case dealing with this precise issue, the implementation of desegregation orders at the time of massive layoffs, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See, Oliver* v. *Kalamazoo Board of Education*, 498 F.Supp. 732, 750, 755 (W.D. Mich. 1980), appeal pending.

The BTU's arguments are, in reality, directed to the District Court's underlying orders and findings of liability, which orders and findings have been previously scrutinized and sustained by the First Circuit Court of Appeals. They raise arguments which have been explicitly rejected by the First Circuit and which this Court has declined to review. They have argued that the 20% figure is wrongly computed, and in effect, that there is no necessity for the desegregation of black faculty in the first instance because the concerns for "role models" have been misplaced. They have focused upon the impact of the 1981 orders on "innocent" third parties, namely the senior white teachers, an impact which the District Court plainly took into account in 1975, 1976 and 1978.

Next, in order to escape the obvious criticism that they are using this occasion to re-litigate settled remedial questions, they now argue that 1981 orders are not necessary because desegregation has already been achieved in the Boston Public School system, an argument wholly without evidentiary support.*

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* The BTU asserted virtually none of the arguments it now presents on appeal to the District Court during the argument conducted below concerning

A. *The First Milliken Requirement.*

The District Court's 1981 order meets the first *Milliken* requirement that the remedy be related to the conditions alleged to offend the Constitution. It was designed to carry out the remedial orders which had been entered in 1975, 1976 and 1978. And those remedial orders were directly related to the unconstitutional conditions found by the District Court. The First Circuit has twice upheld the underlying finding of liability, including those relating to faculty and staff segregation and the initial remedial orders concerning the percentage of black faculty. *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 431 (1st Cir. 1976).

There were findings of pervasive violations of the constitutional rights of black school children in the Boston schools, and particularly violations with respect to the actual composition and distribution of faculty members in the school system. The District Court's 1975, 1976 and 1978 orders were tailored to eradicating that segregated school system, including the segregated faculty and staff. 509 F.2d at 600-601. The 1981 orders did nothing more than "to safeguard the progress towards desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made," as the First Circuit found (A. 8).

While the BTU claims to be challenging the District Court's 1981 order, it is, in reality, challenging — far too late — all of the previous findings and orders. It argues that the 20% figure is inappropriately based on the black population of Boston.

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the Court's original order. It spoke only against the need for layoffs, and against CBEB proposals to tailor the layoff procedures so as actually to increase beyond present ratios the percentage of black faculty. It did not argue that the proposed orders effected an unconstitutional discrimination against senior white teachers. It did not make a request for an evidentiary hearing until its motion for reconsideration, some seven weeks after the Court's original order.

It challenges the very predicate of the Court's faculty desegregation orders, claiming that there is no necessity for "role models" for black students, even in a school system that is now 46% black.

The 20% goal was the subject of rigorous analysis by the District Court, and careful review by the First Circuit. Indeed, the First Circuit implied it was a minimal, conservative approach. The use of that figure, rather than the percentage of black students in the system, the Court noted, was "apparently motivated at least in part by a desire to minimize court involvement over a period of time." 530 F.2d at 433.*

In the alternative, the BTU argues that the 1981 orders are beyond the scope of the constitutional violations because desegregation has now been accomplished.

As the First Circuit noted, this argument has no basis in the present record. The BTU never moved for the District Court to withdraw supervision of the Boston School System. Nothing in its moving papers suggested that it was requesting a hearing for the purpose of introducing evidence in support of such a motion. Without proof that Boston's segregated school system has been eliminated, and indeed with proof to the contrary (A. 9, n.5), the District Court had the power to make orders premised on these unconstitutional conditions it found to exist" (A. 9).

B. *The Second Milliken Factor.*

The BTU claims that the 1981 orders violate the second *Milliken* requirement, that the decree be remedial in nature

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* Many other courts have adopted the "percent of black students" as the appropriate yardstick in formulating faculty desegregation orders. *Keyes* v. *School District No. 1*, 521 F.2d 465, 484 (10th Cir. 1975); *United States* v. *Texas Education Agency*, 467 F.2d 848, 868, 873 (5th Cir. 1972); *Arizona* v. *Waco Independent School District*, 373 F.Supp. 1264, 1270-1271 (W.D. Tex. 1973).

and "it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken* v. *Bradley*, 433 U.S. at 280. It argues that the order benefits black teachers and administrators who were never shown to be the victims of hiring discrimination, and fails to give "appreciable weight" to the incumbent white teachers' interest in not losing their jobs "because of their race." BTU Petition for Writ of Certiorari (hereinafter "petition"), p. 18.

The BTU misperceives the nature of the case. At the outset, the District Court issued certain orders, which the First Circuit sustained, with respect to faculty desegregation because of the interests of the *children*. The victims are not the possible hiring discriminatees, but black school children made to survive in a faculty and staff environment that was overwhelmingly white. *Morgan* v. *Hennigan*, 379 F.Supp. at 456. The 1981 order — like the previous ones — benefit these victims of discrimination.

The fact that the interests of white teachers have been, and will continue to be affected by *any* remedial order making black school children whole, has already been considered and rejected by the First Circuit in its review of the initial orders. *Morgan* v. *Kerrigan*, 530 F.2d at 432 n.2. As the First Circuit noted in its most recent opinion, "once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination" (A. 11). And in a school desegregation case, race-conscious remedies may be required where color blind approaches would be inadequate. *Swann* v. *Charlotte-Mecklinburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968).

In any event, the petitioner, BTU, is not a wholly innocent bystander. In 1978, the District Court had to conduct hearings to investigate the flagrant noncompliance with its two-

year-old one-to-one faculty hiring order brought about through the activities of the school defenders with the tacit approval of the BTU.

Moreover, rather than "innocently" relying on settled principles of seniority, the BTU entered into a collective bargaining agreement expressly subject to the court's orders. The seniority provisions governing layoff and recall in the collective bargaining agreement negotiated by the BTU and the school defendants were expressly subordinated to outstanding court orders. The collective bargaining agreement at issue was entered into after the last faculty desegregation order in 1978, and was made subject to "all applicable state and federal laws and lawful orders pursuant thereto." While it may be true that the expectations of some white teachers have been dashed notwithstanding the language of the collective bargaining agreement, the union must shoulder much of the responsibility for falsely raising these expectations.

As the First Circuit found, the District Court's orders:

> [w]ere a reasonable response to the situation which confronted it, and that, in the circumstances they do not constitute forbidden racial preferences. . . . We understand and sincerely regret the fact that the expectations of certain teachers have been defeated, but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The District Court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it. (A. 14.)

C. *The Third Milliken Factor.*

The last prong of the *Milliken* test asks the Court to take into account the interests of state and local authorities in managing

their own affairs consistent with the Constitution. 433 U.S. at 280-281. In the instant case, the maintenance approach adopted by the District Court was consistent with the Boston School Committee's own proposal for dealing with the situation. Thus, as the First Circuit noted: "[t]his is not a case where a judicial formulation has been imposed upon a resistant and objecting administrative body" (A. 15).*

D. *Whether an Evidentiary Hearing was Required.*

The BTU now claims that the District Court erred in not holding an evidentiary hearing "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order." It did not request an evidentiary hearing on the subject of whether or not compliance with the Court's desegregation orders had been achieved. Moreover, the request for an evidentiary hearing was never made until the BTU's motion for reconsideration, some seven weeks after the original order.

In any event, the District Court had all the information it needed to know. It was aware of the impact the layoffs would have on those laid off. It knew the numbers in some detail. All of these factors had been weighed in the balance in years past.

The only question as to which evidence would have to be taken was whether or not the dual school system had been abolished, and thus whether further remedial orders were nec-

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* It should be noted that this factor cuts against the District Court's decision with respect to administrators. As noted in the companion case, school defendants suddenly took a different tack with respect to administrative personnel, although the arguments and issues are identical to those raised by the faculty orders. With respect to administrators, the school defendants ordered layoffs according to "strict seniority." Under those circumstances, the *caveat* in *Milliken* comes into play. Notwithstanding the concerns for local autonomy, if school authorities "fail in their affirmative obligations . . . judicial authority may be invoked." *Milliken* v. *Bradley*, 433 F.2d 280-281.

essary at all. No such evidence was presented, or offered. Nor could it have been. The record before the District Court suggested precisely the opposite (A. 9 n.5).

II. A District Court's Orders Fit Squarely Within the Constitutionally Permissible Scope of Race-Conscious Remedies.

The BTU argues that there is a "fundamental difference between 'integrating' of faculty — that is, hiring and assigning teachers in a non-discriminatory manner — and single-mindedly insisting on a fixed mathematical ratio of black teachers based on the black population of the locality." Petition, p. 13. Whereas the former may be a permissible remedial order, the latter is an impermissible racial quota.

The law has recognized no such distinction. The court did not order layoffs. It dealt with classic compliance issues — how its goals might be accomplished in a reduction in force situation. The existing orders, which dealt expressly with hiring, were not adequate to protect the original goals. Modification of the Court's prior remedial orders was necessary to prevent their nullification.

The fact that these orders will result in the layoff of white teachers does not alter the situation. As noted above, it is settled law that a Court may enter a remedial order to redress violations of the constitutional rights of school children, even when the order adversely affects contractual or statutory rights of non-minority parties. *Milliken* v. *Bradley*, 433 U.S. 267, 279-281 (1977); *United States* v. *Greenwood Municipal Separate Sch. Dist.*, 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969); *Oliver* v. *Kalamazoo Board of Education*, *supra*. And the District Court may enter further orders to ensure compliance with its original desegregation orders, again,

notwithstanding the fact that rights of non-minorities are adversely affected. *Brown* v. *Neeb*, 644 F.2d 651 (6th Cir. 1981); *Oliver* v. *Kalamazoo*, *supra*.

The distinction between the content of the orders which is affirmed by the First Circuit in 1975 and 1976 and as to which this Court declined review in the instant orders is semantic. The orders in 1981 are necessary to implement the orders which had been entered in 1974 through 1978. Without the 1981 actions of the District Court, those earlier efforts would have been nullified. As the Court of Appeals noted, that was a result which could not be countenanced (A. 13).

Conclusion.

For these above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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